

A **PP v. DATO' SRI MOHD NAJIB HJ ABDUL RAZAK**

FEDERAL COURT, PUTRAJAYA
 RICHARD MALANJUM CJ
 ZAHARAH IBRAHIM CJ (MALAYA)
 DAVID WONG DAK WAH CJ (SABAH & SARAWAK)

B RAMLY ALI FCJ
 TENGKU MAIMUN TUAN MAT FCJ
 IDRUS HARUN FCJ
 NALLINI PATHMANATHAN FCJ
 [CRIMINAL APPEAL NO: (L)-71-03-2019]
 C 10 APRIL 2019

CRIMINAL LAW: Charges – Criminal charges – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges relating to offences under Penal Code, Malaysian Anti-Corruption Commission Act 2009 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – High Court dismissed application for production of instrument for appointment of advocate and solicitor to conduct criminal prosecution against applicant – Decision reversed by Court of Appeal – Appeal against decision of Court of Appeal – Whether appeal ought to be allowed

E **CRIMINAL PROCEDURE:** Prosecution – Conduct of criminal prosecution – Appeal against decision of Court of Appeal – High Court dismissed application for production of instrument for appointment of advocate and solicitor – Decision reversed by Court of Appeal – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Attorney General appointed advocate and solicitor to conduct criminal prosecution against applicant – Whether applicant prejudiced by appointment of advocate and solicitor – Criminal Procedure Code, ss. 51, 129, 333, & 379 – Interpretation Acts 1948 and 1967, s. 55

G **EVIDENCE:** Privilege – Solicitor-client privilege – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Attorney General appointed advocate and solicitor to conduct criminal prosecution against applicant – High Court dismissed applicant's application for production of instrument for appointment of advocate and solicitor – Decision reversed by Court of Appeal – Appeal against decision of Court of Appeal – Whether sight of letter of appointment warranted – Whether there was solicitor-client privilege – Evidence Act 1950, s. 126

H The respondent, former Prime Minister of Malaysia, was charged with seven charges relating to offences committed under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 ('MACCA') and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFAPUA'). Datuk Haji Sulaiman Abdullah ('DHSA'), an advocate and solicitor, was appointed by the appellant, the Public Prosecutor ('PP'), to lead the prosecution against the respondent. At the High Court, the respondent sought the prosecution to produce a copy of the letter of appointment of DHSA. Dismissing the application, the High Court Judge

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(‘HCJ’) held that (i) the letter of appointment did not fall within the ambit of s. 51 of the Criminal Procedure Code (‘CPC’) which covers documents relating to the charge against the respondent; (ii) there was no requirement, in law, to produce the letter of appointment of DHSA when there was no challenge to the appointment and, therefore, the court could not compel its production solely on the ground that the Attorney General (‘AG’) refused to produce it; and (iii) the media release from the PP himself, in the person of the AG, dispensed the need to produce the same in court. The Court of Appeal allowed the respondent’s appeal on the grounds that (i) the letter of appointment did not fall within the scope of s. 126 of the Evidence Act 1950 as the same could not be treated as solicitor-client communication; (ii) the respondent had a legitimate interest or expectation to have sight of the letter of appointment as the criminal justice system, in Malaysia, is an adversarial one and the duty of a prosecutor to act fairly is paramount; and (iii) the letter of appointment fell within the ambit of s. 55 of the Interpretation Acts 1948 and 1967 (‘IA’) and s. 129 of the CPC. The PP complied with the order of the Court of Appeal, which required the letter of appointment be produced within three days from the date of the order. However, the compliance was without prejudice to the present appeal.

Held (allowing appeal; setting aside order of Court of Appeal and reinstating order of High Court)

Per David Wong Dak Wah CJ (Sabah & Sarawak) delivering the judgment of the court:

- (1) The court disagreed with the finding of the Court of Appeal that the respondent had a legitimate expectation to have sight of the letter of appointment. There was no difference whatsoever in conceptual terms in the appointment of DHSA with that of an appointment of a counsel by a private entity to act on its behalf. In a private engagement of counsel by a private entity, it is obvious that an opposing party has no legitimate expectation to sight the letter of appointment of the other side even though their dispute is settled *via* an adversarial system. To say that because the appellant happened to be a public figure, being the PP and with a paramount duty to act fairly, the respondent possessed a legitimate expectation, was misconceived. (paras 10 & 11)
- (2) Whether legitimate expectation exists depends on the circumstances of each case and the circumstances in the present case was not such that where such right existed. If this view was conceded to, the ramification would be this; whenever any Government or Government-linked companies or statutory bodies appoint private counsel to prosecute its case, the opposing party could then demand to see the letter of appointment just because there is some sort of public element in the appointment. In short, unless there is a challenge to the validity of the appointment of counsel, there exists no duty on the appointing authority or private entity to produce the letter of appointment. (para 12)

- A (3) The Court of Appeal found that the appointment of DHSA was not protected by the solicitor-client communication rule. Suffice to say that privileged communication between solicitor-client starts when discussion among the respective parties is held as to whether a particular counsel should be appointed. (para 13)
- B (4) Reading s. 55 of the IA and s. 129 of the CPC with care, the PP was obliged to produce documents which were necessary to the charge prior to the commencement of the prosecution. Those necessary documents included sanction to prosecute, consent of the PP and authorisation under s. 129 of the CPC. How a letter of appointment of a counsel was
- C a 'necessary' document for prosecution of a case was hard to comprehend as it did not, in any way, relate to the charge preferred against the respondent. (para 14)
- D (5) The compliance of the order of the Court of Appeal by the respondent was made without prejudice to the present appeal. This was made known to the respondent. This communication was not made known to the court by the respondent. This lack of candour was, to say the least, disappointing. (para 15)

Bahasa Malaysia Headnotes

- E Responden, bekas Perdana Menteri Malaysia, dituduh dengan tujuh pertuduhan pelakuan kesalahan-kesalahan berkaitan Kanun Keseksaan, Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan Akta Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001. Datuk Haji Sulaiman Abdullah ('DHSA'), seorang peguam bela
- F dan peguam cara, dilantik oleh perayu, Pendakwa Raya ('PR'), untuk mengetuai pendakwaan terhadap responden. Di Mahkamah Tinggi, responden memohon agar pihak pendakwaan mengemukakan sesalinan surat pelantikan DHSA. Menolak permohonan tersebut, Hakim Mahkamah Tinggi ('HMT') memutuskan (i) surat pelantikan tidak terangkum bawah s. 51
- G Kanun Tatacara Jenayah ('KTJ') yang merangkumi dokumen-dokumen berkaitan pertuduhan terhadap responden; (ii) tiada keperluan undang-undang yang mengkehendaki pengemukakan surat pelantikan DHSA jika tiada cabaran terhadap pelantikan, dan dengan itu, mahkamah tidak boleh mendesak pengemukaannya semata-mata atas alasan Peguam Negara ('AG') enggan mengemukakannya; dan (iii) hebahan berita oleh PR sendiri, sebagai
- H AG, tidak memerlukan pengemukakan surat pelantikan di mahkamah. Mahkamah Rayuan membenarkan rayuan responden atas alasan (i) surat pelantikan tidak terangkum bawah s. 126 Akta Keterangan 1950 kerana ini boleh dianggap komunikasi peguam cara-anak guam; (ii) responden mempunyai kepentingan atau jangkaan sah melihat surat pelantikan kerana
- I sistem keadilan di Malaysia bersifat *adversarial* dan tanggungjawab paling utama pendakwa ialah bertindak adil; dan (iii) surat pelantikan terangkum

bawah s. 55 Akta Tafsiran 1948 dan 1967 ('AT') dan s. 129 KTJ. Pendakwa Raya mematuhi perintah Mahkamah Rayuan, yang memerintahkan agar surat pelantikan dikemukakan tiga hari dari tarikh perintah tersebut. Walau bagaimanapun pematuhan tersebut adalah tanpa prejudis terhadap rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Rayuan dan menghidupkan perintah Mahkamah Tinggi)

Oleh David Wong Dak Wah CJ (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

- (1) Mahkamah tidak bersetuju dengan dapatan Mahkamah Rayuan bahawa responden mempunyai jangkaan sah untuk melihat surat pelantikan. Tiada apa-apa beza sekali pun, dalam bentuk konsep pelantikan DHSA dengan pelantikan peguam oleh entiti persendirian untuk bertindak mewakilinya. Dalam pelantikan persendirian seorang peguam, oleh satu entiti persendirian, jelas bahawa satu pihak lawan tidak mempunyai jangkaan sah melihat surat pelantikan pihak satu lagi walaupun pertikaian mereka diselesaikan melalui sistem *adversarial*. Menghujahkan hanya kerana perayu seorang tokoh terkenal, sebagai PR dan berkewajipan utama bertindak adil, responden mempunyai jangkaan sah, adalah satu salah tanggapan. A
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- (2) Sama ada jangkaan sah wujud, atau tidak, bergantung pada hal-hal keadaan setiap kes dan berdasarkan hal-hal keadaan kes ini, hak tersebut tidak wujud. Jika pandangan ini dibenarkan, kesannya adalah, bila-bila masa mana-mana Kerajaan atau syarikat-syarikat berkaitan Kerajaan atau badan berkanun melantik peguam persendirian untuk mendakwa kesnya, pihak lawan akan menuntut untuk melihat surat pelantikan hanya kerana terdapat elemen awam dalam pelantikan tersebut. Pendek kata, kecuali jika terdapat cabaran terhadap kesahan pelantikan peguam, tiada kewajipan untuk pihak yang melantik atau entiti persendirian mengemukakan surat pelantikan. E
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- (3) Mahkamah Rayuan mendapati pelantikan DHSA tidak dilindungi peraturan komunikasi peguam cara-anak guam. Cukup untuk mengatakan komunikasi istimewa antara peguam cara dan anak guam bermula apabila perbincangan antara pihak-pihak dibuat tentang peguam cara yang harus dilantik. G
- (4) Bacaan teliti s. 55 AT dan s. 129 KTJ menunjukkan PR berkewajipan mengemukakan dokumen-dokumen yang perlu buat pertuduhan sebelum pemulaan pendakwaan. Dokumen-dokumen ini termasuk kebenaran mendakwa, kebenaran PR dan pemberian kuasa bawah s. 129 KTJ. Sukar untuk memahami bagaimana satu surat pelantikan seorang peguam cara adalah dokumen yang diperlukan dalam pendakwaan satu-satu kes kerana ini tidak, dalam apa-apa cara, berkait dengan pertuduhan terhadap responden. H
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- A (5) Pematuhan responden akan perintah Mahkamah Rayuan dibuat tanpa prejudis terhadap rayuan ini. Ini dimaklumkan pada responden. Responden tidak memaklumkan tentang komunikasi ini pada mahkamah. Ketiadaan sikap berterus-terang ini mengecewakan.

B **Case(s) referred to:**

More v. Weaver [1928] 2 KB 520 (refd)

Legislation referred to:

Courts of Judicature Act 1964, s. 78(1)

Criminal Procedure Code, ss. 51, 55, 379

Evidence Act 1950, s. 129

- C Official Secrets Act 1972, s. 16A

For the appellant - Tommy Thomas, Manoj Kurup, V Sithambaram, Sulaiman Abdullah, Donald Joseph Franklin, Budiman Lutfi Mohamed & Muhd Izzat Fauzan; DPP

For the respondent - Muhammad Shafee Abdullah, Harvinderjit Singh, Sarah Maalini Abishegam, Al-Firduas Shahrul Naing, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Muhammad Shafee, Nur Syahirah Hanapiah & Zahria Eleena; M/s Shafee & Co

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[Editor's note: Appeal from Court of Appeal; Criminal Appeal No: W-05-2-01-2019 (overruled). Appeal from High Court, Kuala Lumpur; Criminal Trial No: WA-44-194-11-2018 (affirmed).]

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Reported by Najib Tamby

JUDGMENT

David Wong Dak Wah CJ (Sabah & Sarawak):

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Introduction

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[1] This is an appeal by the Public Prosecutor against the decision of Court of Appeal where the learned judges found that the Public Prosecutor is required to produce and show the letter of appointment of Datuk Hj Sulaiman Abdullah ("Datuk Hj Sulaiman"), an advocate and solicitor of the High Court of Malaya, to lead the prosecution of the appellant in respect of seven charges preferred against the respondent under three different legislations, *to wit*, the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceedings of Unlawful Activities Act 2001.

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[2] The Public Prosecutor had complied with the order of the Court of Appeal which required the letter of appointment be produced within three days from the date of order, that is, 25 March 2019. However, it should be made clear here that the Public Prosecutor's compliance with the order of the Court of Appeal was without prejudice to this appeal as made clear by

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the Public Prosecutor to the respondent.

Background Facts

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[3] The respondent had taken out a motion for the following reliefs:

Prayer 1

The Applicant seeks an order from this Honourable Court to compel the Respondent to produce Datuk Haji Sulaiman bin Abdullah's letter of appointment and copies of any other authorization in writing executed by the Respondent in relation to his appointment as a Deputy Public Prosecutor within 3 days from the date of the order;

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Prayer 2

The Applicant be provided with copies of the letter of appointment and documents produced by the Respondent pursuant to Prayer 1; and

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Prayer 3

The Applicant seek any further and/or other order, relief or direction which this Honourable Court may deem fit and proper in the circumstances.

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High Court

[4] The learned judge from the outset after looking at the motion and the supporting and opposing affidavits held that the crux of the motion is not so much as to challenge the validity of the appointment of Datuk Hj Sulaiman but only for production of the said letter of appointment.

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[5] The learned judge refused to sustain the prayers in the aforesaid motion premised on the following grounds:

(i) The letter of appointment does not fall within the ambit of s. 51 of the Criminal Procedure Code which covers documents relating to the charge against the appellant.

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(ii) There is no requirement in law to produce the letter of appointment of Datuk Hj Sulaiman when there is no challenge to the appointment, hence the court cannot compel its production solely on the ground that the Attorney-General had refused to produce it.

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(iii) The media release from the Public Prosecutor himself, in the person of the learned Attorney-General, dispenses the need to produce the same in court.

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(iv) The letter of appointment has been classified as official secret by the issuance of a certificate under s. 16A of the Official Secrets Act 1972. But this point was not taken up in the Court of Appeal nor in this court.

The Court Of Appeal

[6] The Court of Appeal allowed the appeal and made an order in terms of prayer (1) of the notice of motion but only in respect of the letter of appointment, not the other documents sought for in it and in prayer (2).

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- A [7] The reasons for aforesaid decision are these:
- (i) The letter of appointment of Datuk Hj Sulaiman did not fall within the scope of that s. 126 as the same cannot be treated as solicitor-client communication.
 - B (ii) The learned judges found that the respondent has a legitimate interest or expectation to have sight of the letter appointing premised on the fact that our criminal justice system is an adversarial one and the duty of a prosecutor to act fairly is paramount.
 - C (iii) The letter of authorisation of Datuk Hj Sulaiman falls within the ambit of s. 55 of the Evidence Act 1950 and s. 129 of the Criminal Procedure Code (CPC).

Our Decision

- D [8] We start off with the basic premise that the respondent's motion in substance is not to challenge the validity of the appointment of Datuk Hj Sulaiman but only for the production of the letter of appointment. That was the views of the High Court and the Court of Appeal. There is no challenge by the respondent of this finding by way of cross appeal.

- E [9] It is also undisputed that the appellant, being the Public Prosecutor, possess the sole constitutional power to institute and conduct prosecution of all criminal cases in the country. With that power, the appellant also has the power under s. 379 of the CPC to appoint private practitioner to conduct criminal prosecution on his behalf. This appointment is manifested in the letter of appointment of Datuk Hj Sulaiman.

F Legitimate Expectation

[10] The Court of Appeal had in para. 9 of its ground found the respondent had a legitimate expectation and this was how it was put:

- G Further, it is our view that since a private legal practitioner has been appointed to conduct the prosecution against the appellant, not a Deputy Public Prosecutor in the employment of the Attorney-General's Chambers who is a public servant, the appellant has a legitimate interest or expectation to have sight of the letter appointing him to conduct the prosecution for it must be remembered that our criminal justice system is an adversarial one and the duty of a prosecutor to act fairly is paramount.

- H [11] With respect, we disagree with that finding and our reasons are these. There is no difference whatsoever in conceptual terms in the appointment of Datuk Hj Sulaiman with that of an appointment of a counsel by a private entity to act on its behalf. We don't think that can be disputed. In a private engagement of counsel by a private entity, it is obvious that an opposing party has no legitimate expectation to sight the letter of appointment of the other side though their dispute is settled *via* an adversarial system. To say that
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because the appellant happens to be a public figure, being the Public Prosecutor and with a paramount duty to act fairly, the respondent possess a legitimate expectation is, with respect, misconceived.

[12] Further, we have not be shown any case law which has found that in circumstances as we have here, the respondent possesses such legitimate expectation. It is trite that whether legitimate expectation exists depends the circumstances of each case and in our view the circumstances in this case is not such that there exists such right. If we concede to this view, the ramification would be this. Whenever any government or government linked companies or statutory bodies appoint private counsel to prosecute its case in the criminal or civil cases, the opposing party can then demand to see the letter of appointment just because there is some sort of public element in the appointment. In short, we are saying that unless there is a challenge to the validity to the appointment of counsel, there exists no duty on the appointing authority or private entity to produce the letter of appointment. The “busy body” argument has merits and apply with full force in this issue.

Section 126 Of The Evidence Act

[13] The Court of Appeal found that the appointment of Datuk Hj Sulaiman is not protected by the solicitor-client communication rule. Suffice for us to say privileged communication between solicitors-client starts when discussion among the respective parties is held as to whether a particular counsel should be appointed. We adopt what was said by Lord Justice Scrutton in the case of *More v. Weaver* [1928] 2 KB 520 at pp. 522 and 524:

The same absolute privilege applies to counsel. I suppose there are very few counsel who do not, in the course of their speeches, make defamatory statements about someone. Those statements are absolutely privileged because it is in the interest of the State that counsel should be able to speak freely without being exposed to the risk of an action at the instance of a person whose conduct he may have denounced ...

... On the other hand, there is a very high authority of Lord Herschell in *Brown v. Dunn* where he said: “ It seems to me that when communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged ...

Section 55 Of The Interpretation Acts And s. 129 Of The CPC

[14] In regard to the application of s. 55 of the Interpretation Acts and s. 129 of the CPC, this is our view. Reading ss. 55 of the Interpretation Acts and 129 of the CPC with care, we can only discern that the Public Prosecutor is obliged to produce documents which are necessary to the charge prior to

- A the commencement to prosecution. Those necessary documents in our view include sanction to prosecute, consent of the Public Prosecutor and authorisation to prosecute under s. 129 of the CPC. How a letter of appointment of a counsel is a “necessary” document for prosecution of a case is, with respect, hard to comprehend as it does not in any way relate to the charge preferred against the respondent. It is completely unrelated to the charge.
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Academic Appeal

- C [15] As for the submission that the fact that the appellant had complied with the order of the Court of Appeal dated 25 March 2019 makes this appeal academic. Our short answer is simply that the compliance of the Court of Appeal order was made without prejudice of this appeal and we are informed that this was made known to the respondent’s counsel. This communication, with respect, was not made known to us during submission by learned counsel for the respondent. This lack of candour is to say the least disappointing. We say this with reluctance even though we are fully aware that our criminal system is an adversarial one. But as pointed out by lead counsel for the respondent, counsel are officers of the court.
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- E [16] Finally, we find merit in the contention that the Public Prosecutor had himself appeared in the High Court and Court of Appeal and informed both courts that he had appointed Datuk Hj Sulaiman as counsel assisting his prosecution team. That in our view is sufficient unless there is a challenge to the validity of his appointment.

- F [17] For reasons stated above, we allow the appeal of the Public Prosecutor and set aside of the order of the Court of Appeal and consequently reinstate the order of the High Court.

- G [18] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964 in view of the absence of our learned sisters, Justice Tengku Maimun binti Tuan Mat and Justice Nallini Pathmanathan.

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